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TETRA TECH EC, INC.
9

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12

13 TETRA TECH EC, INC.,

14 Plaintiff,

15 v.

16 UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; ANDREW R.
17 WHEELER, as ADMINISTRATOR of the
UNITED STATES ENVIRONMENTAL
18 PROTECTION AGENCY; UNITED STATES
DEPARTMENT OF THE NAVY; KENNETH
19 J. BRAITHWAITE, as SECRETARY OF
THE UNITED STATES NAVY,
20

21 Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
RELIEF**

Administrative Procedure Act, 5 U.S.C. § 551,
et seq.

22 Plaintiff Tetra Tech EC, Inc. seeks a declaration from this Court that the Final Parcel G
23 Removal Site Evaluation Work Plan for the Former Hunters Point Naval Shipyard in
24 San Francisco, California (June 2019) (Final Parcel G Work Plan), prepared by the United States
25 Department of the Navy and approved by the United States Environmental Protection Agency, is
26 unlawful. Plaintiff seeks this declaration on the grounds that the Department of the Navy, the
27 Secretary of the Department of the Navy, the Environmental Protection Agency, and the
28 Administrator of the Environmental Protection Agency (together, Defendants) violated the

1 Administrative Procedure Act (APA) in preparing and approving the Final Parcel G Work Plan by
2 (1) changing their position without articulating a reasoned explanation for the change, (2) relying
3 on unproven allegations and draft documents that Defendants failed to include in the
4 administrative record, (3) ignoring reliable, contrary evidence that did not fit their preordained
5 outcome, and (4) violating applicable statutory provisions, regulations, and guidance documents
6 governing their actions.

7 I. INTRODUCTION

8 1. In late 2016, bowing to political pressure driven by a misinformed public outcry,
9 Defendant United States Environmental Protection Agency (EPA) arbitrarily decided that *all*
10 investigation and remediation of radionuclides conducted by Plaintiff Tetra Tech EC, Inc. (TtEC)
11 at the former Hunters Point Naval Shipyard (Hunters Point)—which had been ongoing for more
12 than a decade—had to be entirely redone. EPA claimed the rework was necessary because two
13 former rogue employees of TtEC had pleaded guilty to falsifying a limited number of soil samples
14 in some Hunters Point locations, so that meant that *none* of TtEC's data could be trusted. EPA
15 arrived at this conclusion even though the data itself and other reliable evidence did not support it.
16 EPA decided to start the rework at Parcel G.

17 2. Defendant United States Department of the Navy (Navy) argued against EPA's
18 position at first. The Navy recommended that all of TtEC's data be evaluated to confirm its
19 reliability, rather than redoing the entire site remediation before the data evaluation was final. But,
20 EPA forced the Navy to agree to its outcome-driven plan by threatening to withhold its approval
21 to release remediated parcels at Hunters Point for redevelopment if the Navy did not acquiesce.

22 3. EPA's decision was not driven by law or science; rather, EPA was trying to save
23 face in the midst of public allegations of negligent regulatory oversight by forcing the Navy to
24 redo all the radiological remediation work. Working backward from this position, EPA viewed
25 TtEC's site data through a biased, unscientific lens and demanded an approach that guarantees a
26 complete do-over at Parcel G.

27 4. Defendants cast aside any consideration of the necessity or reasonableness of the
28 costs associated with their arbitrary decision making, and are now determined to extract those

1 costs from TtEC.

2 5. Defendants claim that the purpose of the Final Parcel G Work Plan "is to determine
3 whether current site conditions are compliant with the remedial action objective (RAO) in the
4 Parcel G Record of Decision (ROD) (Navy, 2009)" which seeks to "[p]revent exposure to
5 radionuclides of concern in concentrations that exceed remediation goals for all potentially
6 complete exposure pathways." Final Parcel G Work Plan, Executive Summary, at III; Parcel G
7 ROD, at 29. An "exposure pathway" is the way a person may come into contact with a hazardous
8 substance.

9 6. However, Defendants failed to consider that thousands of cubic yards of
10 radiologically-impacted soil from Parcel G was already sent offsite for disposal, and thus poses no
11 current risk. Further, the remaining soil in Parcel G is currently overlain by a fully intact and
12 continuous "durable cover" which consists of hardscape (asphalt, concrete, and buildings). The
13 durable cover is a physical cap that prevents exposure to the soil underneath, and is a critical part
14 of the Navy's selected remedy for Parcel G, as detailed in the Parcel G ROD. The durable cover,
15 combined with institutional controls (i.e., land use restrictions), prevents exposure to any
16 remaining contaminants in the soil at Parcel G. The Parcel G selected remedy, which includes the
17 durable cover, was determined to be "protective of human health and the environment" and "cost-
18 effective." Parcel G ROD, Sec. 1.1—Selected Remedy, at 2. Given the soil removal that already
19 occurred, and the design and nature of the durable cover, Parcel G currently poses no risk of
20 exposure to any radionuclides of concern.

21 7. Despite the protective nature of the durable cover and its importance as part of the
22 selected remedy for Parcel G, Defendants intend to tear off the durable cover and conduct
23 extensive re-excavation at Parcel G. This will create potential exposure pathways to radionuclides
24 of concern—the precise outcome Defendants claim they are trying to prevent.

25 8. After spending tens of millions of dollars re-excavating Parcel G, Defendants will
26 then have to reconstruct the durable cover—essentially bringing the site conditions back to where
27 they are now. Thus, the net benefit of implementing the Final Parcel G Work Plan is zero. The
28 RAO is designed to prevent or minimize exposure to radionuclides of concern in concentrations

1 that exceed remediation goals for all potentially complete exposure pathways. The presence of the
2 existing durable cover means that this RAO has been attained. And, Defendants made no finding
3 to the contrary prior to preparation and approval of the Final Parcel G Work Plan.

4 9. Instead of unnecessarily destroying the durable cover and re-excavating Parcel G, it
5 would be safer, equally effective, and less costly to conduct confirmatory sampling by using a
6 drilling rig to drill borings through the asphalt and concrete, collecting soil samples from extracted
7 soil cores, and testing those samples for radionuclides. The use of borings and core sampling
8 would be much simpler and less likely to result in exposure pathways because it would not require
9 destroying the existing durable cover and excavating large amounts of underlying soil. However,
10 Defendants did not consider this option—though TtEC brought it to their attention in comments
11 on the Draft Parcel G Work Plan—in violation of the law.

12 10. To justify their unlawful course of action, Defendants relied on unproven
13 allegations by disgruntled former subcontractors, a draft desktop review of TtEC's environmental
14 data by competitor consultants (which was done negligently and never finalized), and EPA's own
15 selective and outcome-driven desktop data review. None of these materials were made part of the
16 administrative record for Hunters Point. Nonetheless, Defendants used the allegations, the draft
17 evaluation, and EPA's data review to conclude that TtEC's prior remediation work must be redone
18 in Parcel G, as called for in the Final Parcel G Work Plan.

19 11. Defendants' conclusions are contradicted by reliable evidence. TtEC and the Navy's
20 investigation into a small number of soil sampling abnormalities identified in 2012 at Hunters
21 Point found no anomalous samples associated with Parcel G. The two former rogue employees
22 who admitted to falsifying samples collected in 2012 did not admit to any unauthorized sampling
23 activities within Parcel G. Following the investigation into the anomalous samples, TtEC's
24 Parcel G remediation data were approved by the Navy and EPA. The Hunters Point administrative
25 record—and even the unreliable extra-record materials on which Defendants actually relied—
26 simply do not justify Defendants' decision to have the Navy redo, and TtEC fund, all of the
27 radiological remediation work in Parcel G.

28 12. Defendants violated regulations and guidance documents mandating the procedures

1 to be followed when conducting a remedial cleanup under the Comprehensive Environmental
2 Response, Compensation, and Liability Act (CERCLA). Defendants failed to comply with the
3 National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which governs the
4 Hunters Point remedial action. Remediation costs that are inconsistent with the NCP are not
5 recoverable. 42 U.S.C. § 9607(a)(4)(A). Defendants also ignored EPA's own guidance documents
6 which dictate how to make and document CERCLA remedial decisions. Specifically, Defendants
7 (1) relied on unproven allegations and draft documents that are not included in the administrative
8 record, (2) failed to assess the current site conditions at Parcel G with the durable cover in place,
9 (3) failed to consider the risks associated with destroying the durable cover, (4) failed to consider
10 the costs versus the benefits of implementing the Final Parcel G Work Plan as opposed to other
11 reasonable alternatives, and (5) failed to document remedial decisions that differ significantly
12 from those set forth in the Parcel G ROD, either with a ROD amendment or an Explanation of
13 Significant Differences (ESD).

14 13. Because Defendants changed their position without reasoned explanation, violated
15 applicable statutory provisions and regulations, and did not base their decisions on sound evidence
16 and the administrative record, Defendants' preparation and approval of the Final Parcel G Work
17 Plan violates the APA.

18 II. JURISDICTION AND VENUE

19 14. This Court has jurisdiction over the subject matter of this action pursuant to 28
20 U.S.C. § 1331 (action arising under the laws of the United States), and 5 U.S.C. §§ 702 (providing
21 for judicial review of agency action under the APA).

22 15. The United States has waived sovereign immunity for claims arising under the
23 APA. 5 U.S.C. § 702.

24 16. An actual controversy exists between the parties within the meaning of the
25 Declaratory Judgment Act, 28 U.S.C. § 2201(a), and this Court may grant declaratory relief and
26 other relief pursuant to 28 U.S.C. §§ 2201–02 and 5 U.S.C. §§ 703 (authorizing actions for
27 declaratory judgments).

28 17. Venue in this District is proper pursuant to 28 U.S.C. § 1391 because the property

1 that is the subject of this action is located in this District.

2 **III. PARTIES**

3 18. Plaintiff Tetra Tech EC, Inc. is an environmental construction company
4 incorporated in Delaware, with its principal place of business in San Diego, California.

5 19. Defendant United States Environmental Protection Agency is an agency in the
6 executive branch of the federal government. Its principal office is at 1200 Pennsylvania Avenue,
7 N.W., Washington, D.C. 20460. EPA is the federal agency with primary regulatory oversight over
8 the Hunters Point environmental cleanup.

9 20. Defendant Andrew R. Wheeler is named in his official capacity as Administrator of
10 the EPA.

11 21. Defendant United States Department of the Navy is a department in the Department
12 of Defense. Its principal office is at 1000 Navy Pentagon, Washington, D.C. 20350. Plaintiff is
13 informed and believes and on that basis states that the Navy owns Parcel G at Hunters Point in fee.
14 The Navy is the lead agency responsible for the environmental investigation and cleanup at
15 Hunters Point.

16 22. Defendant Kenneth J. Braithwaite is named in his official capacity as the Secretary
17 of the Navy.

18 23. Any mandatory decree, as requested herein, must specify by name the federal
19 officer(s) responsible. 5 U.S.C. § 702.

20 **IV. STANDING**

21 24. Plaintiff TtEC is adversely affected by Defendants' preparation, approval, and
22 implementation of the Final Parcel G Work Plan. The Final Parcel G Work Plan calls into question
23 TtEC's prior work at Parcel G without any basis in the administrative record. Specifically, the
24 Final Parcel G Work Plan states: "An independent third-party evaluation of previous data
25 identified additional potential manipulation, falsification, and data quality issues with data
26 collected at Parcel G (Navy, 2017, 2018). As a result, the Navy developed this work plan to
27 investigate radiological sites in Parcel G." Final Parcel G Work Plan, Executive Summary, at III
28 (emphasis added).

1 25. No "independent, third-party evaluation" of TtEC's work at Parcel G has ever been
2 officially released by the Navy, disseminated for public review and comment, or included in the
3 administrative record for Hunters Point. Moreover, the draft report to which the Final Parcel G
4 Work Plan refers found only "potential" issues with only a portion of TtEC's remediation data.
5 Yet, the Final Parcel G Work Plan dictates that all remediation previously completed by TtEC at
6 Parcel G must be redone.

7 26. Plaintiff faces a real and immediate threat of injury to its financial interests from
8 the approval and implementation of the Final Parcel G Work Plan. Despite lacking a rational basis
9 for the extensive work to be conducted, the Navy has repeatedly indicated it intends to recoup the
10 costs associated with the Final Parcel G Work Plan from TtEC.

11 27. The Navy and the United States Department of Justice (DOJ) are in active litigation
12 with TtEC, and therein have stated that the United States will recover the costs associated with the
13 Final Parcel G Work Plan from TtEC, as follows:

14 A. In a complaint filed against TtEC on July 15, 2019, pursuant to the False
15 Claims Act, DOJ alleged that the United States' damages include the cost of re-
16 testing TtEC's work at Hunters Point and the cost of agency coordination to
17 effectuate the re-testing. *U.S. ex rel. Jahr, et al. v. Tetra Tech EC, Inc., et al.*, Case
18 No. 13-cv-03835-JD (*Jahr*) (ECF No. 82), United States' First Amended Complaint
19 in Intervention, at ¶¶ 91–92, 103.

20 B. DOJ stated in a joint Case Management Conference statement filed in *Jahr*
21 on June 6, 2019, that "[t]he United States estimates consequential damages to
22 exceed \$100,000,000. This number may increase as this case progresses." *Jahr*
23 (ECF No. 73), Joint Case Management Conference Statement at 18.

24 28. The Navy also submitted a victim impact statement in a criminal action filed
25 against Justin Hubbard. *See* Letter from Laura Duchnak (Navy, Director of Base Realignment and
26 Closure Program) to Judge Donato regarding Victim Impact Statement (March 15, 2018) in
27 *United States of America v. Justin E. Hubbard*, Case No. CR-17-00278-JD (ECF No. 17), Exhibit
28 A (Navy Statement). In advocating for a significant custodial sentence, the Navy estimated that

1 required site rework at Hunters Point would cost between \$100,000,000 and \$300,000,000. *Id.* at
2 3.

3 29. Defendants' arbitrary and capricious actions and failure to follow applicable
4 regulations in preparing and approving the Final Parcel G Work Plan has injured and will continue
5 to injure TtEC. TtEC will suffer an injury in fact, which is concrete, particularized, actual, and
6 imminent because the Navy seeks to recover its costs related to the Final Parcel G Work Plan from
7 TtEC, even though Defendants' actions are arbitrary and not in accordance with the law.

8 30. TtEC has an interest in ensuring that the responsible party, the Navy, bears the
9 costs for cleaning up its own contamination, to the extent any contamination still exists.

10 31. TtEC will benefit from a favorable ruling in this action because the United States
11 will not be allowed to recover the unnecessary and excessive costs of preparing, approving, and
12 implementing the unlawful Final Parcel G Work Plan from TtEC.

13 32. Any person suffering legal wrong because of agency action, or adversely affected
14 or aggrieved by agency action, is entitled to judicial review thereof. 5 U.S.C. § 702.

15 33. This action is a justiciable controversy, ripe for consideration by this Court. The
16 APA authorizes this Court to "hold unlawful and set aside agency action, findings, and
17 conclusions" that violate the law or are otherwise "arbitrary and capricious." 5 U.S.C. § 706.

18 **V. OVERVIEW OF THE FINAL PARCEL G WORK PLAN**

19 34. Defendants claim that the purpose of the Final Parcel G Work Plan is to determine
20 whether Parcel G was remediated in conformity with the Parcel G ROD. However, instead of
21 conducting reasonable confirmatory sampling, Defendants' Final Parcel G Work Plan ensures a
22 complete do-over of remediation at Parcel G, without considering the effectiveness of the current
23 remedy or the costs and benefits of redoing the work.

24 35. Defendants claim that the Final Parcel G Work Plan will prevent exposing
25 "receptors" to levels of radionuclides of concern (ROCs) that exceed the remediation goals set by
26 the Parcel G ROD. In contrast to this claimed objective, Defendants fashioned a methodology
27 costing tens of millions of dollars that starts with removing Parcel G's durable cover, which was
28 constructed as a remedial measure precisely to prevent any such exposure. Defendants plan to

1 destroy Parcel G's durable cover without assessing the cover's effectiveness in preventing
 2 exposure, the risks of destroying the cover, and without conducting a cost-benefit analysis, all of
 3 which are required by CERCLA.

4 36. Defendants also plan to re-excavate previously backfilled trenches in Parcel G
 5 rather than collecting soil samples by drilling through the durable cover and extracting soil cores, a
 6 reasonable and less costly alternative. Further, Defendants will over-excavate the footprint of the
 7 prior trenches excavated by TtEC, unearthing previously untouched soils.

8 37. Defendants have also changed the background levels of naturally occurring
 9 radionuclides to be used in sample comparisons, and in turn changed the remedial goals for two
 10 ROCs—all without documenting a need to do so, without considering risks, costs, or benefits, and
 11 without amending the Parcel G ROD or issuing an ESD, as CERCLA requires.

12 38. The Final Parcel G Work Plan is the culmination of the government's arbitrary and
 13 capricious decision-making process that determines rights and obligations from which legal
 14 consequences will flow. Specifically, the Final Parcel G Work Plan provides the tasks and
 15 procedures for how the Navy will re-investigate and re-remediate Parcel G. The Final Parcel G
 16 Work Plan functionally mandates a complete do-over of the Parcel G investigation and
 17 remediation performed by TtEC. It is not tentative; it requires destruction of the existing durable
 18 cover, excavation, and sampling. Should the Navy now fail to implement the EPA-approved Final
 19 Parcel G Work Plan, it will be subject to the dispute resolution mechanisms outlined in Section 12
 20 of the Federal Facility Agreement for Hunters Point.

21 39. EPA approved the soil radiological retesting work under the Final Parcel G Work
 22 Plan on August 18, 2020.¹

23 **VI. STATUTORY AND REGULATORY FRAMEWORK**

24 **A. Administrative Procedure Act (APA)**

25 40. "A person suffering legal wrong because of agency action, or adversely affected or
 26

27 _____
 28 ¹ Letter from John Chesnutt, EPA to Derek Robinson, Navy, *EPA Approval to Begin Parcel G Soil Radiological Retesting* (August 18, 2020).

1 aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review
 2 thereof." 5 U.S.C. § 702. Title 5 United States Code section 551(13) defines "'agency action' [to]
 3 include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or
 4 denial thereof, or failure to act."

5 41. A "reviewing court shall ... hold unlawful and set aside" agency action, findings, or
 6 conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in
 7 accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of
 8 statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706.

9 42. An agency action is arbitrary and capricious when the agency relied on factors
 10 which Congress did not intend it to consider; "entirely failed to consider an important aspect of the
 11 problem, offered an explanation for its decision that runs counter to the evidence before the
 12 agency, or is so implausible that it could not be ascribed to a difference of view or the product of
 13 agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463
 14 U.S. 29, 43 (1983). The "agency must examine the relevant data and articulate a satisfactory
 15 explanation for its action including a 'rational connection between the facts found and the choice
 16 made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

17 43. Agency action that changes course or deviates from existing policy must be
 18 accompanied by a reasoned explanation for the change. *Encino Motorcars, LLC v. Navarro*, 136
 19 S. Ct. 2117, 2125 (2016). A detailed justification for a change is generally required when a new
 20 course rests upon factual findings that contradict those underlying prior policy. *See F.C.C. v. Fox*
 21 *TV Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

22 **B. Comprehensive Environmental Response, Compensation, and Liability Act**
 23 **(CERCLA)**

24 44. CERCLA, also known as Superfund, was enacted in 1980 to identify, investigate,
 25 and clean up hazardous waste sites.

26 45. The primary purpose of CERCLA is to ensure the prompt and effective cleanup of
 27 waste disposal sites, and to ensure that parties responsible for environmental contamination bear
 28 the cost of remedying the hazardous conditions they create. *Carson Harbor Vill., Ltd. v. Unocal*

1 *Corp.*, 270 F.3d 863, 880 (9th Cir. 2001).

2 46. CERCLA requires the use of science, risk assessment, cost-benefit analyses, and
3 institutional controls to develop remedial goals and plans. *See, e.g.*, 40 C.F.R. § 300.430.

4 47. Implementing CERCLA's objectives requires coordinated efforts by many distinct
5 entities, including potentially responsible parties (here, the Navy), environmental regulators (such
6 as EPA), and remediation contractors (like TtEC).

7 48. CERCLA recognizes the critical role remediation contractors play in carrying out
8 CERCLA's goals and contains provisions to ensure the fair and consistent treatment of
9 remediation contractors in the Superfund program. *See, e.g.*, 42 U.S.C. § 9619.

10 a. CERCLA Applies to Federal Facilities, Including Hunters Point

11 49. Federal agencies are subject to and required to comply with CERCLA, including
12 the liability provisions contained in CERCLA section 107, to the same extent as non-
13 governmental entities. 42 U.S.C. § 9620; 42 U.S.C. § 9607(g).

14 50. Guidelines, rules, regulations, and criteria, including the NCP, apply to remedial
15 actions at Federal Facilities "in the same manner and to the extent as such guidelines, rules,
16 regulations, and criteria are applicable to other facilities." 42 U.S.C. § 9620(a)(2).

17 51. The limitation on judicial review under CERCLA section 113(h) (42 U.S.C.
18 § 9613(h)) is not applicable to remedial actions undertaken at Federal Facilities under CERCLA
19 section 120 (42 U.S.C. § 9620), including the cleanup at Hunters Point. *Fort Ord Toxics Project,*
20 *Inc. v. California E.P.A.*, 189 F.3d 828, 834 (9th Cir. 1999).

21 b. The National Contingency Plan (NCP)

22 52. The NCP is the legislatively-mandated regulatory scheme under CERCLA that
23 addresses how the federal government responds to contaminated sites, including those listed on
24 the National Priorities List (NPL), otherwise known as Superfund sites.

25 53. The purpose of the NCP, which was promulgated by EPA, is to ensure consistent,
26 risk-based, and cost-effective investigation and cleanup of sites listed under CERCLA. 40 C.F.R.
27 § 300.1, *et seq.* The NCP details the required procedures for responding to releases or potential
28 releases of hazardous substances.

54. The NCP requires the lead agency to assemble and evaluate existing data from a site, including the results of any site inspections, preliminary assessments, removal actions, and the NPL listing process (40 C.F.R. § 300.430(b)), and then to use that information to develop a remedial investigation plan to characterize the nature of, and threat posed by, hazardous materials at a site. 40 C.F.R. § 300.430(b)–(d).

55. The NCP requires the lead agency conducting a cleanup to adequately characterize the site, including, as appropriate, to "conduct field investigations, including treatability studies, and conduct a baseline risk assessment." 40 C.F.R. § 300.430(d)(1).

56. Following the baseline risk assessment, the NCP requires the lead agency to consider the feasibility of remedial alternatives, and to consider cost, along with effectiveness and implementability, in assessing those alternatives. 40 C.F.R. § 300.430(e)(7)–(9).

57. Once the remedial investigation is complete, the remedy is selected and documented in a ROD. 40 C.F.R. § 300.430(f)((ii).

58. Significant post-ROD changes to the remedy must be appropriately documented. 40 C.F.R. § 300.435(c)(2).

59. CERCLA costs are not recoverable when inconsistent with the NCP. 42 U.S.C. § 9607(a)(4)(A); *Washington State Dept. of Transp. v. Washington Nat. Gas Co., Pacificorp*, 59 F.3d 793, 802 (9th Cir. 1995).

c. EPA Superfund Guidance Documents

60. EPA publishes guidance documents to assist potentially responsible parties, consultants, remedial project managers, and EPA staff in assessing and documenting required remediation activities at Superfund sites. This guidance is instructive because it explains how EPA interprets applicable laws and oversees regulated parties conducting Superfund cleanups.

61. EPA's "A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents" details procedures and guidance for, *inter alia*, how and when to amend or document changes to a ROD. EPA 540-R-98-031, OSWER 9200.1-23P (July 1999) (EPA Remedy Selection Guidance).

62. A federal agency must follow its own regulations, rules, and procedures. *United*

1 *States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) *superseded by statute on other*
 2 *grounds as stated in Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1961 (2020); *see*
 3 *also Natl. Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003).

4 **VII. FACTUAL ALLEGATIONS**

5 **A. History of the Hunters Point Naval Shipyard**

6 63. Hunters Point is located on the shores of the San Francisco Bay in Southeast San
 7 Francisco. It comprises over 900 acres, approximately half of which are under water. The dry
 8 lands consist largely of fill materials moved from existing lands and hills in the area, or from other
 9 locations in and around the San Francisco Bay.

10 64. The Navy operated a naval base at Hunters Point from approximately 1940 until the
 11 base was deactivated in or around 1974. In 1991, Hunters Point was placed on the Navy's Base
 12 Realignment and Closure (BRAC) list, and designated for closure.

13 65. The Navy used radioactive materials at Hunters Point to support Naval operations,
 14 including in support of the World War II effort, and for research purposes at the Naval
 15 Radiological Defense Laboratory.

16 66. In 2004, the Navy published the Hunters Point Shipyard Final Historical
 17 Radiological Assessment, History of the Use of General Radioactive Materials 1939–2003 (2004
 18 HRA), which documents the history and use of radioactive materials and identifies potential areas
 19 of radiological contamination at Hunters Point.

20 67. The Navy also contaminated soil, sediments, surface water, and groundwater at
 21 Hunters Point with petroleum fuels, pesticides, heavy metals, polychlorinated biphenyls, and/or
 22 volatile organic compounds. Hunters Point soils also contain naturally occurring radionuclides,
 23 asbestos, and metals.

24 68. Hunters Point was added to the NPL on November 21, 1989. The Department of
 25 Defense is authorized to undertake CERCLA response actions by 10 U.S.C. § 2701 *et seq.* and
 26 Executive Order 12580. Hunters Point was slated for cleanup through the Navy's Installation
 27 Restoration Program, by which the Navy seeks to identify, investigate, and clean up contamination
 28 of hazardous materials at its bases throughout the country.

69. EPA and the California Department of Toxic Substances Control (DTSC), on behalf of the State of California, oversee and enforce the Navy's cleanup. To that end, the Navy, EPA, and the State of California entered into a Federal Facility Agreement, effective January 22, 1992, which governs the cleanup of Hunters Point conducted under CERCLA section 120.²

70. Pursuant to the Federal Facility Agreement, the Navy is the lead agency at Hunters Point and has jurisdiction over investigation and remediation of the site. EPA is the lead regulatory agency with oversight over the Navy's cleanup.

71. The Navy's BRAC Program Management Office manages the cleanup at Hunters Point with assistance from the Navy's Radiological Affairs Support Office (RASO).

72. To organize and facilitate the Superfund cleanup, the Navy divided Hunters Point into alpha-numeric parcels. Parcel G is located in the central portion of former Parcel D. *See* Parcel G ROD, Figure 2 (attached as Exhibit A).

B. Prior Parcel G Investigation and Remediation

73. As early as 1988, the Navy began investigating former Parcel D, which was later divided into Parcels D-1, D-2, G, and UC-1. *See* Parcel G ROD at Table 1; *see also* Exhibit A. Former Parcel D was part of the Naval Shipyard's industrial support area and was used for shipping, ship repair, and office and commercial space.

74. The Navy used the Final Revised Feasibility Study Report for Parcel D (November 30, 2007), which includes a human health risk assessment, to assess Parcel G. The Final Radiological Addendum to the Final Revised Feasibility Study Report for Parcel D (April 11, 2008) contains the most recent radiological risk evaluation for former Parcel D, and provides the basis for the Parcel G ROD. This radiological risk evaluation assumed there was no durable cover constructed on Parcel G.

75. The Navy finalized the Parcel G ROD on February 18, 2009. The ROD assessed chemical, radiological, and groundwater contamination at Parcel G, and documented the Navy's remedial decision making based on the risks assessed at that time. The remedy selected in the

² The Hunters Point Federal Facility Agreement is available here: https://www.navfac.navy.mil/niris/SOUTHWEST/HUNTERS_POINT_NS/N00217_005218.PDF.

1 2009 Parcel G ROD included the construction of a durable cover to prevent exposure to
2 underlying soil.

3 a. TtEC's Work at Parcel G

4 76. The Navy awarded contracts to TtEC to conduct radiological remediation and
5 construction work at Hunters Point, including radiological investigations and remediation in
6 Parcel G. TtEC was not responsible for remediating any chemical or metal contamination in Parcel
7 G.

8 77. The Navy chose to conduct a Time-Critical Removal Action (TCRA) to address
9 potential radiological contamination of buildings, former building sites, storm drains, and sanitary
10 sewers in Parcel G, which started before approval of the Parcel G ROD. The TCRA was one part
11 of the overall remedy for Parcel G.

12 78. TCRA's are used to reduce or prevent imminent and substantial threats to the public
13 health, welfare, or the environment caused by a hazardous release at a property. A Final Basewide
14 Radiological Removal Action Memorandum dated April 21, 2006 (2006 TCRA Memo)
15 documented the TCRA under which TtEC investigated and remediated radiological contamination
16 in Parcel G. Table 1 of the 2006 TCRA Memo lists the remedial goals (i.e., the cleanup standards)
17 for radionuclides of concern at Hunters Point. Those remedial goals were incorporated into the
18 Parcel G ROD. *See* Parcel G ROD at Table 5.

19 79. During the TCRA, TtEC's work in Parcel G was to investigate and remediate
20 specific locations potentially impacted by radiological contamination, as identified in the 2004
21 HRA.

22 80. From 2007 through 2011, TtEC excavated, removed, and disposed of storm drain
23 and sanitary sewer systems throughout Parcel G. TtEC excavated soil to a minimum depth of one
24 foot below and on either side of the removed sewer lines. TtEC excavated and screened
25 approximately 50,000 cubic yards of soil at Radiological Screening Yards (RSYs). The excavated
26 trenches and the RSYs were divided into "survey units," and each survey unit was sampled at
27 certain intervals across the unit. When samples were above the radiological remedial goals, soil in
28 that area would be further sampled, delineated, and removed. TtEC identified thousands of cubic

1 yards of soil that exceeded radiological remedial goals and transferred that soil to the Navy's
2 disposal contractor for offsite disposal. TtEC's work is documented in the Final Removal Action
3 Completion Report for Parcel G, Hunters Point Naval Shipyard, San Francisco, California
4 (December 2, 2011) (Parcel G RACR).

5 81. During trench excavation and pipe removal in Parcel G, 63 unique trench survey
6 unit identification numbers were assigned for tracking purposes, and for documenting Final Status
7 Surveys (FSS). The FSS objective was to demonstrate that residual radionuclide levels in the
8 excavated trenches and backfill did not exceed the TCRA remedial goals. TtEC documented
9 survey results in the Survey Unit Project Reports (SUPRs) prepared for each of the 63 trench
10 survey units.

11 82. TtEC also completed radiological surveys at nine radiologically impacted areas
12 identified in the 2004 HRA, including Buildings 351, 351A, 364, 365, 366, 401, 408, 411, and
13 439, and one former building site where three separate structures (Buildings 317, 364, and 365)
14 were previously located. TtEC performed FSS surveys of the Parcel G buildings and former
15 buildings sites, which demonstrated that residual radionuclide levels met the radionuclide-specific
16 remedial goals, as documented in FSS reports.

17 83. Navy RASO and BRAC, and regulatory agencies including EPA, DTSC, and the
18 California Department of Public Health (CDPH), were responsible for monitoring and reviewing
19 TtEC's work and performance at Hunters Point, including in Parcel G. Navy RASO personnel
20 were often on-site at Hunters Point and were in frequent contact with TtEC to monitor the
21 progress of TtEC's work. The Parcel G RACR documented the work performed by TtEC. The
22 Navy and regulatory agencies reviewed the data and information provided in the Parcel G RACR
23 and determined that remediation for radionuclides at Parcel G was successful and complete.

24 b. Investigation of Anomalous Samples

25 84. During the course of TtEC's work at Hunters Point, certain sampling results at an
26 area outside of Parcel G (the former Building 517 area in Parcel E) showed lower than expected
27 Potassium-40 levels. Potassium-40 is a naturally-occurring radionuclide present at various levels
28 in soil and geological materials throughout Hunters Point and is not a radionuclide of concern.

1 After these anomalous sampling results were identified, TtEC conducted a comprehensive
2 investigation, in close coordination with the Navy, to determine the cause of the anomalies. TtEC
3 (1) carefully reviewed all survey units with samples that showed lower than expected Potassium-
4 40 results in consultation with the Navy, (2) suspended or removed technicians associated with
5 identified anomalous samples, (3) collected new samples to evaluate the anomalous samples, and
6 (4) rejected all sample results that were not confirmed through analysis of the new samples.

7 85. The Navy and TtEC did not make any investigation or remediation decisions based
8 on any of the rejected samples identified during the investigation. Likewise, no regulatory agency,
9 including EPA, based any remediation-related decisions on any rejected samples.

10 86. The Navy was satisfied with TtEC's response to the anomalous samples and
11 thereafter continued to issue contract task orders to TtEC for investigation and remediation of
12 radiological contamination at Hunters Point.

13 87. TtEC summarized the investigation in a report entitled "Investigation Conclusion
14 Anomalous Soil Samples at Hunters Point Naval Shipyard," which TtEC finalized in April 2014.

15 88. TtEC determined that the likely cause of the anomalous sample results was that
16 certain individuals had not collected soil samples from the locations identified in chain-of-custody
17 records.

18 89. During and following the investigation, TtEC implemented multiple corrective
19 actions to ensure the accuracy of all sampling. For example, TtEC developed procedures to
20 immediately identify and escalate any atypical sample results and instituted additional training on
21 sampling protocols and ethics. In addition, the Navy hired an independent consultant (Battelle) to
22 provide surveillance and quality assurance for radiological work at Hunters Point. Navy Statement
23 at 2.

24 90. TtEC's investigation continued after the final 2014 report was submitted. With
25 Navy input and oversight, TtEC continued to evaluate survey units and address all issues that
26 arose during the course of the extended investigation to the satisfaction of the Navy.

27 91. In total, TtEC identified 30 survey units (out of more than 900 total survey units) at
28 Hunters Point that showed potentially anomalous data. TtEC, in close consultation with the Navy,

1 corrected all issues that were identified.

2 92. None of the survey units with anomalous data were located in Parcel G.

3 93. TtEC did not identify any additional anomalous sampling data following its
4 investigation and corrective actions.

5 94. The Navy accepted TtEC's corrective actions and presented TtEC's final 2014
6 investigation report to the regulatory agencies, including EPA, in July 2014.

7 95. In January 2017, the Navy confirmed it had accepted TtEC's investigation results in
8 a public fact sheet stating that after TtEC and the Navy had conducted their investigation and "the
9 new sampling and cleanup work was complete, independent analysis of the final data confirmed
10 that radiological contamination had, in fact, been cleaned up properly."

11 96. In 2017, two former TtEC employees pleaded guilty to destruction, alteration, or
12 falsification of records in violation of 18 U.S.C. § 1519, for their role in the unauthorized
13 sampling. The specific locations identified in the plea agreements where the unlawful conduct
14 took place were addressed during TtEC's investigation and in the final 2014 investigation report.

15 97. None of the specific locations where these two former rogue employees admitted to
16 altering or falsifying data are within the boundaries of Parcel G.

17 **C. The Secret Tiger Team Process**

18 98. In or around 2016, apparently in response to media reports and allegations made on
19 television by a former Hunters Point subcontractor, Anthony Smith, the Navy assembled a
20 Technical Team, known as the Hunters Point "Tiger Team," to further investigate TtEC's work at
21 Hunters Point. The Tiger Team decided to review all of the radiological data collected by TtEC at
22 Hunters Point since 2006. The Navy contracted with CH2M Hill, Inc. (CH2M) to conduct a
23 desktop evaluation of TtEC's radiological data.

24 99. On December 13, 2016, the Tiger Team convened for a scoping meeting. Attendees
25 included Navy personnel and staff from several regulatory agencies, including EPA, CDPH,
26 DTSC, the San Francisco Department of Public Health, and the San Francisco Bay Regional
27 Water Quality Control Board. Also in attendance were CH2M personnel, other environmental
28 consultants, San Francisco Office of Community Investment and Infrastructure staff, and Mark

1 Luckhardt, then the Senior Project Manager for Five Point Holdings, LLC (Five Point), the private
2 developer selected to redevelop Hunters Point, and the person at Five Point in charge of the
3 Hunters Point redevelopment project.

4 100. At this initial scoping meeting and throughout the Tiger Team process, EPA, led by
5 Remedial Project Manager Lily Lee, advocated an unscientific approach to evaluating TtEC's data.
6 EPA began with the premise that because former TtEC employees had admitted, and TtEC's
7 investigation had discovered, that certain soil samples had been falsified, the Tiger Team could not
8 say that *any* of TtEC's data were reliable—even if the statistical tests proposed by CH2M to
9 evaluate those data *revealed no issues with the data*. EPA took this new approach despite the fact
10 that the Navy in January 2017 had already certified that after "the new sampling and cleanup work
11 was complete, independent analysis of the final data confirmed that radiological contamination
12 had, in fact, been cleaned up properly." Thus, from the beginning, EPA pushed to throw out all of
13 TtEC's data and force the Navy to completely redo the work at Hunters Point. EPA wanted to start
14 over because it was being publicly accused of lax regulatory oversight at Hunters Point.

15 **D. The Unscientific and Biased CH2M Draft Parcels B and G Report**

16 101. The Navy pushed back on EPA's new position, arguing for data evaluation instead.
17 Under intense pressure from EPA, CH2M—which is a competitor to TtEC—used unscientific
18 analytical tools and methods to evaluate TtEC's data and conclude that approximately half of the
19 Parcel G soil survey units sampled by TtEC showed signs of "potential data manipulation or
20 falsification."

21 102. CH2M shared its unscientific findings in the Draft Radiological Data Evaluation
22 Findings Report for Parcels B and G Soil, Former Hunters Point Naval Shipyard, San Francisco,
23 California, dated September 2017 (Draft Parcels B and G Report). This report was not finalized or
24 officially released by the Navy, not disseminated for public review and comment, and not placed
25 in the Hunters Point administrative record.

26 103. The Draft Parcels B and G Report relies on incorrect underlying assumptions,
27 applies arbitrary logic tests and inappropriate statistical tests to TtEC's data, relies on data graphs
28 that are inaccurate and misrepresent the data, and reaches false and biased conclusions.

1 104. At every juncture, the Draft Parcels B and G Report assumes, without evidence,
2 that any and all variability in the data was caused by malfeasance. It ignores documented,
3 scientific explanations for data variability, and instead blindly assumes misconduct by site
4 workers.

5 105. The result of this biased and flawed methodology is a report that aims to support
6 EPA's predetermined conclusion that TtEC's work is tainted. CH2M's unscientific evaluation of
7 the data led the Navy to erroneously conclude that a large portion of TtEC's Parcel G data is
8 unreliable.

9 106. Defendants then used this invalid conclusion from the Draft Parcels B and G
10 Report to justify the work outlined in the Final Parcel G Work Plan. *See* Final Parcel G Work
11 Plan, Executive Summary, at III ("An independent third-party evaluation of previous data
12 identified additional potential manipulation, falsification, and data quality issues with data
13 collected at Parcel G (Navy, 2017, 2018)."). Yet, Defendants failed to place the Draft Parcels B
14 and G Report in the Hunters Point administrative record.

15 107. Capitalizing on its unsubstantiated conclusions about TtEC's remediation work,
16 CH2M then contracted to complete the site rework purportedly necessitated by its own evaluation
17 of TtEC's data—a clear conflict of interest that Defendants simply ignored. CH2M was thus
18 incentivized to find as many problems with TtEC's data as possible, whether or not problems
19 actually existed. The more data CH2M could question, the more confirmation fieldwork would be
20 required, and the more profit CH2M would secure in the future.

21 108. The meeting notes from the secretive Tiger Team process document how CH2M's
22 flawed Draft Parcels B and G Report was massaged, manipulated, and revised to achieve EPA's
23 desired outcome. However, even the biased CH2M report could not fully justify EPA's chosen
24 result.

25 **E. EPA's Selective and Biased Data Evaluation**

26 109. Even though CH2M's flawed evaluation cast unfounded suspicion on data from
27 almost half of the Parcel G survey units, EPA went even further to cast suspicion on data
28 throughout Parcel G by second-guessing only the data from the survey units that CH2M had found

1 required "No Further Action" (NFA). In other words, EPA blindly accepted CH2M and the Navy's
2 findings of data problems, but disagreed with CH2M and the Navy nearly every time the data were
3 deemed reliable. Thus, EPA accepted CH2M's findings wholesale when those findings served
4 EPA's goal of a complete do-over, but rejected CH2M's findings when they did not—the epitome
5 of an outcome-driven, biased approach.

6 110. EPA's cherry-picking of CH2M's data evaluation led to EPA concluding that 97%
7 of survey units in Parcel G required further investigation.³ EPA's biased methodology was
8 designed to conclude that all survey units had to be fully resampled, thus aligning with the
9 preordained outcome that EPA had announced during the December 2016 Tiger Team scoping
10 meeting, prior to CH2M and the Navy conducting any evaluation whatsoever of TtEC's data.

11 111. EPA's flawed review utilized many of the same (albeit faulty) assumptions and
12 methods that CH2M had used, but even though EPA and CH2M were evaluating the same data for
13 the same reason, EPA found twice as many "suspect" results.

14 112. EPA, like CH2M, ignored well-documented soil variability at Hunters Point. EPA
15 incorrectly assumed that changes in naturally occurring radioactive materials (NORM) were a sign
16 of data falsification, when in fact, such changes are consistent with the highly variable soils on-
17 site. NORM is ubiquitous and present to varying degrees in nearly all soil. In fact, the Navy's own
18 effort to re-characterize background radionuclide (i.e., NORM) levels in 2019 during the
19 Background Soil Study clearly illustrates this point. The Navy's Background Soil Study found the
20 same variability in NORM in 2019 that EPA used as evidence of potential data falsification in
21 TtEC's data.

22 113. If EPA applied the same criteria to the data collected under its close supervision
23 during the 2019 Background Soil Study that it applied to TtEC's data, EPA would be forced to
24 conclude that the Navy's 2019 Background Soil Study data are suspect because they show the
25

26
27 ³ See Letter from John Chesnutt, Manager Pacific Islands and Federal Facilities Section,
28 Superfund Division, EPA to George Brooks, Navy, enclosing *EPA Review of Draft Radiological
Data Evaluation Findings Report for Parcels B and G Soil, Former Hunters Point Naval
Shipyard, San Francisco, California, September 2017* (Dec. 27, 2017).

1 same "signs of falsification" that EPA claims is present in TtEC's data.

2 114. EPA concocted additional arbitrary and non-diagnostic assumptions to deploy as
3 further "signs of falsification." For example, EPA flagged certain samples because the reported
4 mass differed in samples between the on- and off-site labs. This demonstrates a fundamental lack
5 of understanding of the sample collection and transfer process at Hunters Point. Sample collection
6 containers varied, and sometimes required repackaging at the laboratory prior to analysis, in which
7 case mass would be expected to change. Additionally, the water content of some samples was
8 reduced between analyses due to drying in the laboratory, again resulting in an expected change in
9 mass. All sample preparation and transfer steps must be understood to interpret the sample mass
10 reported by a laboratory. Absent such an understanding, any conclusion derived from sample
11 weight values is speculative and unscientific, like EPA's here.

12 115. Even the Tiger Team realized the arbitrary nature of EPA's so-called data review
13 while it was in progress, and in October 2017 discussed that the "identification of potential
14 falsification need [*sic*] to be demonstrated and stand up in court," which EPA agreed to take into
15 account when fashioning its public comments. HPNS Technical Team Meeting Agenda Notes
16 (Oct. 17, 2017), at 1.

17 **F. The Conception and Preparation of the Unlawful Final Parcel G Work Plan**

18 116. In September 2017, the Tiger Team concluded—at EPA's behest—that it would
19 shift from evaluating TtEC's radiological data (under the Navy's contract with CH2M) and instead
20 focus on collecting new radiological data throughout Hunters Point.

21 117. In October 2017, the Tiger Team discussed resampling throughout Parcel G
22 because the Tiger Team thought that "Parcel G was likely subject to falsification based on
23 timing...." HPNS Technical Team Meeting Agenda Notes (Oct. 17, 2017), at 1. Apparently, the
24 Tiger Team mistakenly believed that TtEC's Parcel G work had occurred around the same time as
25 the investigated anomalous sampling had occurred. In fact, TtEC's remediation work in Parcel G,
26 with the sole exception of work at trench unit 204, took place between 2007 and 2009. *See* Parcel
27 G RACR at Table 3-3. In contrast, the unauthorized soil sampling identified during TtEC and the
28 Navy's investigation, and the admitted sample record falsification by two former TtEC employees,

1 occurred in 2011 and 2012.

2 118. The Navy noted during a subsequent Tiger Team meeting that shifting the
3 "objective from identifying potential data falsification to re-evaluating the parcel [was] a large
4 undertaking (~\$200M and ~4 years) to redo all TtEC's work." HPNS Technical Team Meeting
5 Agenda Notes (Nov. 7, 2017), at 2. Notwithstanding this explicit lament, the Navy failed to do a
6 cost-benefit analysis as required by the NCP. 40 C.F.R. § 300.430(e)(7)(iii).

7 119. In March 2018, EPA announced that if the Navy did not conduct a complete do-
8 over at Parcel G, EPA would not approve transfers of parcels to the City of San Francisco for
9 redevelopment, meaning the Navy would be stuck with Hunters Point indefinitely.⁴ EPA's demand
10 was improperly based on unproven, disputed allegations by disgruntled former subcontractors and
11 CH2M and EPA's biased data reviews. *Id.* at Attachment 1.1 at pp. 1, 3, 4. EPA concluded "that
12 the previous data is unusable" and required the Navy to completely redo all radiological
13 remediation work at Parcel G. *Id.* at Attachment 1.1 at p. 1. The Navy rolled over and began
14 writing the Draft Parcel G Work Plan.

15 120. EPA was so zealously committed to forcing the Navy to redo TtEC's work, it
16 encouraged the Navy to recast the allegations against TtEC as "fact." At the September 18, 2018
17 Tiger Team meeting, the Navy walked through EPA's comments on the Draft Parcel G Work Plan
18 and specifically called out EPA's insistence that:

19 "Various locations in the text where allegations of potential data
20 manipulation and falsification are referenced should now be stated
as fact."

21 HPNS Technical Team Meeting Agenda Notes (Sept. 18, 2018), at 2. Clearly uncomfortable with
22 EPA's direction to state unproven allegations as facts, the Navy stated that "the language will be
23 updated in consultation with Navy legal since all of the allegations have not been confirmed." *Id.*

24 121. The Tiger Team realized early on that the Parcel G rework posed potential
25

26
27 ⁴ Letter from John Chesnutt, Manager Pacific Islands and Federal Facilities Section, Superfund
28 Division, EPA, to Laura Duchnak, Navy, enclosing *EPA Comments on Draft Work Plan
Radiological Survey and Sampling, Former Hunters Point Naval Shipyard, San Francisco,
California*, February 2018 (March 26, 2018) (March 2018 EPA Comments), at 1.

1 challenges for CERCLA compliance, because EPA's approach required setting new background
2 levels for ROCs, which would impact remedial goals. EPA's approach also required a significant
3 and unjustified change in cost and required destroying the durable cover to re-excavate the filled-
4 in trenches. So, the Navy started to evaluate "CERCLA paths," including "a ROD amendment (or
5 post-ROD change)" HPNS Technical Team Meeting Agenda Notes (April 17, 2018), at 1.

6 122. The Navy was right to be concerned. The Final Parcel G Work Plan in fact requires
7 fundamental changes to the Parcel G remedy, including changing remedial goals. Thus, a ROD
8 amendment is required. A ROD amendment is required when a fundamental change is made to the
9 basic features of the remedy selected in a ROD. 40 C.F.R. § 300.435(c)(2)(ii); *see also* EPA
10 Remedy Selection Guidance, at 7-5 ("When a fundamental change is made to the basic features of
11 the remedy selected in a ROD with respect to scope, performance, or cost, the lead agency is
12 required to develop and document the change consistent with the ROD process"). Fundamental
13 changes "involve an appreciable change" in scope, performance, and/or cost. *See* EPA Remedy
14 Selection Guidance, at 7-2. Here, no ROD amendment was prepared, even though the Final Parcel
15 G Work Plan caused an appreciable change in the scope, performance, and cost of the remedy.

16 123. If the changes to the remedy for Parcel G are considered significant, rather than
17 fundamental, an ESD is required under the NCP and EPA's guidance documents. An ESD is
18 required when a remedial action "differs significantly from the remedy selected in the ROD, with
19 respect to scope, performance, or cost[.]" 40 C.F.R. § 300.435(c)(2)(i); *see also* EPA Remedy
20 Selection Guidance, Chapter 7, at 7-2. Any such ESD must be also added to the administrative
21 record. 40 C.F.R. § 300.825(a)(2). Significant changes to a remedy include large increases in cost
22 and new cleanup levels. *See* EPA Remedy Selection Guidance, Highlight 7-1: Examples of Post-
23 Record of Decision Changes, at 7-3. Here, no ESD was prepared.

24 124. In June 2018, the Navy circulated the Draft Parcel G Work Plan to regulators and
25 the public for comment. At a Tiger Team meeting shortly thereafter, EPA insisted that if only *one*
26 sample collected at Parcel G exceeded *one* remedial goal, 100 percent of the Parcel G trenches
27 would have to be re-excavated. HPNS Technical Team Meeting Agenda Notes (Jun. 19, 2018),
28 at 1. EPA complained that the Navy's draft plan omitted this "requirement." *Id.*

125. During a meeting in October 2018, EPA acknowledged that its single-sample failure rule did not follow the Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM),⁵ but rather was based on its desire to improve public perception. The Navy asserted that because MARSSIM was used to calculate the number of samples to be taken, MARSSIM should be used to demonstrate compliance with the remedial goals. In particular, the Navy was concerned that the approach EPA proposed for Hunters Point should not become precedent for other sites. EPA replied that it was employing this approach at Hunters Point because, EPA said, it "provides a positive message." HPNS Technical Team Meeting Agenda Notes (Oct. 16, 2018), at 3.

126. In the nearly four years during which Defendants worked on the Parcel G Work Plan (from December 2016 to August 2020), the Navy gave TtEC and the public *only sixty days* to comment on the proposed plan (from June 15 to August 14, 2018).

127. Despite Defendants' attempts to keep the public largely out of the development of the Parcel G Work Plan, TtEC submitted comments that identified the flaws described herein to the Navy. TtEC submitted comments on both the Draft Parcel G Work Plan (June 2018) and the Draft Final Parcel G Work Plan (November 2018). The Navy also received other critical comments from other interested parties. The Navy and EPA were on notice of the problems with the Final Parcel G Work Plan, yet they proceeded nonetheless.

G. The 2019 Background Soil Study and Report

128. Because soil at Hunters Point contains NORM, the baseline level of background radionuclides must be determined in order to set remedial goals for soil samples.

129. An important principle when remediating any radiologically impacted site is that background, or naturally occurring, levels of radionuclides should not be remediated. The remedial goals are designed to clean up the radionuclides *in excess* of the naturally occurring levels, but not to clean up NORM. Remediation should only take place where excess risk is

⁵ MARSSIM was developed by EPA, the Department of Defense, the Department of Energy, and the Nuclear Regulatory Commission to provide a standardized approach to demonstrating compliance with radiological dose- or risk-based regulations.

1 greater than the protective threshold specified in the NCP, with excess risk based on exposure to
2 radionuclide concentrations *above* background levels. For instance, at Hunters Point, the remedial
3 goal for radium-226 is defined as the risk-based criteria (1 pCi/g) plus the background
4 concentration. Parcel G ROD at Table 5.

5 130. During the August 7, 2018 Tiger Team meeting, the Navy raised concerns about
6 "cleaning up background and NORM." The Navy was well aware that during TtEC's prior
7 remediation work, remedial goals were set very close to background levels, which often led to
8 unnecessary remediation. This was acknowledged in the Draft Parcel G Work Plan (June 2018),
9 which stated "[t]he RGs [remedial goals] used previously [by TtEC] are within background
10 ranges. Therefore, soil that was considered contaminated could have been attributable to naturally
11 occurring radioactivity or anthropogenic fallout (Argonne National Laboratory, 2011)." Draft
12 Parcel G Work Plan, Executive Summary, at IV. This language disappeared from later versions of
13 the Parcel G Work Plan, including the Draft Final Parcel G Work Plan (November 2018) and the
14 Final Parcel G Work Plan (June 2019).

15 131. Defendants certainly did not want to get stuck cleaning up NORM like TtEC had,
16 so they designed a Background Soil Study to investigate and establish higher background levels.

17 132. As a result of the Background Soil Study, the remedial goal for cesium-137
18 changed. The change of the cesium-137 remedial goal is a fundamental change because it has
19 resulted and will result in a substantial increase in scope, cost, and overall approach to the remedy,
20 and therefore it requires a ROD amendment. At minimum, the remedial goal change is significant
21 and requires an ESD. Defendants' failure to appropriately document this change violates the NCP
22 and EPA's guidance documents.

23 133. As a result of the Background Soil Study, the background level for radium-226 also
24 changed. Thus, the remedial goal for radium-226 changed, because the remedial goal for radium-
25 226 is 1 pCi/g plus the background concentration. This change will affect the scope and cost of the
26 remedy as well.

27 134. Despite these changes to the remedial goals, Defendants failed to prepare a ROD
28 amendment or an ESD, in violation of the APA and CERCLA. Defendants' decision making is

1 arbitrary, capricious, and not in accordance with the law.

2 **H. The Flawed Parcel G Soil Sampling Plan**

3 135. In August 2020, EPA approved the soil sampling plan in the Final Parcel G Work
4 Plan. The sampling plan is flawed and designed to lead to the re-excavation of 100 percent of the
5 trenches in Parcel G. Re-excavation of all Parcel G trenches is inevitable, because a single
6 exceedance in one sample of one remedial goal for one ROC will trigger a complete re-excavation,
7 and given EPA's approach, a single exceedance is guaranteed.

8 136. The Final Parcel G Work Plan is divided into two phases. In Phase I, 33 percent of
9 the survey units (21 of 63 total survey units) in Parcel G will be completely re-excavated,
10 sampled, and characterized. Final Parcel G Work Plan, Appendix B, Sampling and Analysis Plan
11 (Parcel G SAP), at 6. The 21 survey units selected for Phase I were not randomly selected but
12 actually targeted based on the likelihood of contamination. *Id.*

13 137. Regardless of the outcome of Phase 1, Phase 2 will proceed, with sampling in the
14 remaining 42 survey units. The results of Phase 1 will determine only *how* the work will be done
15 during Phase 2—re-excavation of trenches versus borings into trench areas. Re-excavation of 100
16 percent of Phase 2 survey units will occur if even one sample exceeds any remedial goal during
17 Phase 1. Parcel G SAP, at 6.

18 138. The probability that at least one sample in Phase 1 will fail to meet a remedial goal
19 by chance alone, is 99.999999998 percent—essentially, a 100 percent probability of failure.⁶
20 Therefore, there is 100 percent certainty that all of the Parcel G trenches will be re-excavated and
21 all of the soil investigation and remediation at Parcel G will be re-done.

22 139. In addition, the Navy intends to *over-excavate* the trench survey units previously
23 excavated by TtEC by at least 6 inches in all directions. Final Parcel G Work Plan, at 3-2, 3-8.

24 _____
25 ⁶ This is because the Final Parcel G Work Plan does not call for taking one sample at each of the
26 21 survey units as would be expected. Instead, the Navy plans to take at least 25 samples in each
27 of the 21 survey units. *See* Final Parcel G Work Plan at 3-7. The Navy then plans to test each of
28 the 25 samples in the 21 survey units for at least 3 ROCs. *Id.* The result is that the Navy will test at
least 25 samples x 21 survey units x 3 ROCs for a total of 1,575 actual comparisons of samples to
the RGs. If any one test reveals any ROC above the RG, that single failure means the entirety of
Parcel G must be re-excavated and re-remediated.

1 Thus, the Navy will be investigating new soil—soil that TtEC was never required to excavate,
 2 sample, or remediate—to ostensibly evaluate whether TtEC failed to remediate that soil. This
 3 approach is nonsensical, arbitrary, and unfair.

4 140. By designing the sampling plan in this manner, EPA's preordained outcome of a
 5 complete redo of the Parcel G remediation work is guaranteed.

6 141. Needless to say, the Phase 1 and 2 excavation and sampling requires destruction of
 7 the durable cover currently in place in Parcel G. *See* Final Parcel G Work Plan, at 3-5. Yet, neither
 8 the Navy nor EPA considered the health and safety effects of the durable cover, or the risks
 9 associated with its destruction.

10 **CLAIMS FOR RELIEF – 5 U.S.C. § 706**

11 **FIRST CLAIM FOR RELIEF**

12 **THE NAVY'S CHANGE IN POSITION FROM DATA APPROVAL AND EVALUATION,**
 13 **TO COMPLETELY RE-EXCAVATING PARCEL G, IS ARBITRARY AND**
 14 **CAPRICIOUS.**

15 **(Against the Navy and the Secretary of the Navy)**

16 142. Plaintiff re-alleges and incorporates by reference the preceding paragraphs above as
 17 though set forth fully herein.

18 143. For years after the anomalous soil sample results were discovered in 2012, and
 19 thoroughly investigated thereafter, the Navy publicly defended TtEC's radiological work,
 20 repeatedly stating that the work was conducted properly, as confirmed by the TtEC and Navy
 21 investigation. TtEC submitted multiple reports to the Navy describing the investigation and
 22 corrective actions, which the Navy accepted and discussed with federal, state, and local
 23 environmental regulatory agencies. The Navy's independent quality assurance contractor did not
 24 identify any further quality or sampling issues. The Navy continued to award TtEC additional
 25 work at Hunters Point for many years after the investigation concluded. The Navy's statements and
 26 actions show that the Navy had found that the isolated sampling anomalies were satisfactorily
 27 resolved.

28 144. Ignoring its own prior findings, the Navy then arbitrarily and capriciously changed
 its position in response to public pressure and threats from EPA, acquiescing to the complete do-

1 over of Parcel G's radiological remediation.

2 145. The Navy changed its position to accede to EPA's demands even though its prior
3 findings, and even CH2M's more recent draft findings, contradicted EPA's approach.

4 146. An agency modifying its position must articulate a reasoned explanation for the
5 change. *Encino*, 136 S. Ct. at 2125. The Navy has not articulated a reasoned explanation for its
6 changed position concerning the remediation previously conducted by TtEC at Parcel G. Nor has
7 the Navy reasonably explained its decision to shift from evaluating TtEC's data to re-excavating
8 and re-remediating Parcel G in its entirety.

9 147. The Navy's failure to support its change in position with a reasoned explanation
10 renders it arbitrary and capricious.

11 **SECOND CLAIM FOR RELIEF**

12 **THE NAVY AND EPA'S RELIANCE ON UNPROVEN ALLEGATIONS AND DRAFT**
13 **DOCUMENTS NOT IN THE ADMINISTRATIVE RECORD IS ARBITRARY AND**
14 **CAPRICIOUS AND CONTRARY TO LAW.**

15 **(Against All Defendants)**

16 148. Plaintiff re-alleges and incorporates by reference the preceding paragraphs above as
17 though set forth fully herein.

18 **A. The Navy's Reliance on the Draft Parcels B and G Report as the Basis for the**
19 **Remedial Actions in the Final Parcel G Work Plan Is Contrary to Law.**

20 149. The Navy relied on CH2M's draft evaluation of TtEC's radiological remediation
21 data in preparing the Final Parcel G Work Plan.

22 150. CH2M's draft evaluation of TtEC's radiological remediation data was never
23 officially released by the Navy, never disseminated for public review and comment, and never
24 made part of the administrative record for Hunters Point.

25 151. The NCP requires that "all documents that form the basis for the decision to modify
26 the response action shall be added to the administrative record file[]" when a remedial decision is
27 modified, and a ROD amendment or ESD is required. 40 C.F.R. § 300.825(a)(2).

28 152. The Navy's reliance on the CH2M draft evaluation as the basis for modifying the
remedial actions at Parcel G, as explicitly stated in the Final Parcel G Work Plan, without adding

1 the underlying evaluation document to the administrative record, is not in accordance with the law.

2 **B. EPA Improperly Relied on Unproven Allegations and Its Own Data Review to Justify**
 3 **Its Decision Concerning Parcel G.**

4 153. EPA relied on unproven, disputed allegations by disgruntled former subcontractors
 5 to conclude that TtEC's prior "sampling of trench soils is unreliable." *See* March 2018 EPA
 6 Comments, Attachment 1.1 at p. 1. Based on these disputed allegations, EPA concluded "that the
 7 previous data is unusable" and required the Navy to completely redo all radiological remediation
 8 work at Parcel G. March 2018 EPA Comments, at 1.

9 154. EPA's decision to rely on unfounded claims, which are not part of the
 10 administrative record for Hunters Point, violates the NCP (40 C.F.R. § 300.825(a)(2)), and its own
 11 guidance documents. *See* EPA Remedy Selection Guidance, at 7-1 (when new information
 12 substantially supports the need to significantly alter the response action "the lead agency must
 13 consider and respond to this information and place such comments and responses in the
 14 Administrative Record file.")

15 155. In its own data review, EPA alleged, without proof or detail, that there was a
 16 "general failure to follow Work Plans by the previous contractor"—meaning, TtEC. March 2018
 17 EPA Comments, at Attachment 1.1 at p. 1.

18 156. EPA's reliance on non-specific, unfounded, and unverified allegations and its own
 19 biased data review, none of which are in the administrative record for Hunters Point, violates the
 20 APA.

21 **THIRD CLAIM FOR RELIEF**

22 **THE NAVY'S FAILURE TO CONDUCT A RISK ASSESSMENT OF CURRENT**
 23 **CONDITIONS AT PARCEL G, AND EPA'S APPROVAL OF THE FINAL PARCEL G**
 24 **WORK PLAN ABSENT A RISK ASSESSMENT, ARE ARBITRARY AND CAPRICIOUS**
 25 **AND CONTRARY TO LAW.**

26 **(Against All Defendants)**

27 157. Plaintiff re-alleges and incorporates by reference the preceding paragraphs above as
 28 though set forth fully herein.

///

A. The Navy's Failure to Conduct a Risk Assessment That Considers the Durable Cover, and EPA's Approval of the Final Parcel G Work Plan Without That Assessment, Are Arbitrary and Capricious.

158. The NCP requires the lead agency conducting a cleanup to conduct a remedial investigation to adequately characterize the site. 40 C.F.R. § 300.430(d)(1). To do so, "the lead agency shall, as appropriate, conduct field investigations, including treatability studies, and conduct a baseline risk assessment." *Id.*

159. The NCP further requires the lead agency to assemble and evaluate existing data on the site, including the results of any removal actions, remedial preliminary assessment and site inspections, and the NPL listing process. 40 C.F.R. § 300.430(b). The lead agency must use that information to develop a remedial investigation plan to characterize the nature of and threat posed by hazardous materials at the site. 40 C.F.R. § 300.430(b)–(d).

160. The Navy failed to conduct a baseline risk assessment for Parcel G that assessed current site conditions. Prior investigations and assessments used to support the 2009 Parcel G ROD cannot be used to support the Final Parcel G Work Plan because current site conditions are substantially different than in 2009. Specifically, Parcel G trenches were excavated, soil was removed from the site, additional soil was remediated, and the entire parcel was capped with a durable cover, in accordance with the Parcel G ROD selected remedy. *See* Final Fourth Five-Year Review, Hunters Point Naval Shipyard, San Francisco, CA (July 2019), at 3-32–3-35.

161. The Parcel G ROD was prepared prior to completion of radiological investigations and remediation, and prior to construction of the durable cover. *See* Parcel G ROD, at 14.

162. The Navy and EPA now intend to destroy the durable cover and re-excavate Parcel G without conducting a risk assessment of the current site conditions with the durable cover in place.

163. The Navy's implementation of the Final Parcel G Work Plan without a baseline risk assessment that includes the effect of the durable cover is unscientific and unsound, violates the NCP (40 C.F.R. § 300.430(b)–(d)), and is arbitrary and capricious and not in accordance with the law.

164. EPA's approval of the Final Parcel G Work Plan absent such a baseline risk

1 assessment is likewise arbitrary and capricious and not in accordance with the law.

2 **B. The Navy's Failure to Consider the Risks Associated with Destruction of the Durable**
3 **Cover, and EPA's Approval of the Destruction Absent that Consideration, Are**
4 **Arbitrary and Capricious.**

5 165. Destroying the durable cover will create potential exposure pathways for any
6 radionuclides, metals, and chemicals that remain in the underlying soil, notwithstanding EPA's
7 stated insistence that all exposure pathways need to be eliminated. The very process EPA has
8 forced on the Navy creates exactly the potential danger about which EPA claims to be concerned.

9 166. The Navy has not considered the risks associated with destruction of the Parcel G
10 durable cover.

11 167. The Navy's decision to destroy the durable cover is therefore arbitrary and
12 capricious.

13 168. EPA's approval of the Final Parcel G Work Plan, which mandates the destruction of
14 the durable cover, absent adequate consideration of the associated risks, is likewise arbitrary and
15 capricious.

16 **FOURTH CLAIM FOR RELIEF**

17 **THE NAVY'S FAILURE TO ADEQUATELY CONSIDER AND DOCUMENT THE**
18 **INCREASED COSTS OF THE FINAL PARCEL G WORK PLAN, AND EPA'S**
19 **APPROVAL OF THE WORK PLAN WITHOUT ANALYZING THE INCREASED**
20 **COSTS, ARE ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW.**

21 **(Against All Defendants)**

22 169. Plaintiff re-alleges and incorporates by reference the preceding paragraphs above as
23 though set forth fully herein.

24 170. The costs for implementing the Final Parcel G Work Plan are estimated to exceed
25 \$30,000,000. These costs are in addition to those already identified in the Parcel G ROD.

26 171. The NCP requires the lead agency to consider cost, along with effectiveness and
27 implementability, in assessing remedial alternatives. 40 C.F.R. § 300.430(e)(7).

28 172. The Navy will incur the costs of the Final Parcel G Work Plan, despite the fact that
neither EPA nor the Navy conducted a cost-benefit analysis.

173. The Navy and EPA did not adequately consider other alternatives to large-scale

1 excavation at the site, including less intrusive, less expensive confirmatory sampling methods to
2 verify the results of the prior remediation at Parcel G.

3 174. The costs of the large-scale excavation and remediation planned at Parcel G are
4 "grossly excessive compared to the overall effectiveness." 40 C.F.R. § 300.430(e)((7)(iii).

5 175. Similarly, the Navy has not adequately considered whether destruction of the
6 durable cover is necessary, or conducted an analysis of the costs, in violation of the NCP.

7 176. EPA's approval of the Final Parcel G Work Plan, which mandates the destruction of
8 the durable cover, absent adequate consideration of the necessity and cost of doing so, is arbitrary
9 and capricious.

10 177. Defendants' new remedial plan for Parcel G is arbitrary and capricious because it
11 will result in excess costs that can reasonably be avoided and because the enormous costs of the
12 Parcel G rework have not been properly analyzed.

13 **FIFTH CLAIM FOR RELIEF**

14 **THE NAVY'S FAILURE TO AMEND THE PARCEL G ROD OR ISSUE AN ESD, AND**
15 **EPA'S FAILURE TO REQUIRE SUCH ROD AMENDMENT OR ESD, ARE ARBITRARY**
16 **AND CAPRICIOUS.**

16 **(Against All Defendants)**

17 178. Plaintiff re-alleges and incorporates by reference the preceding paragraphs above as
18 though set forth fully herein.

19 179. The Navy's remedial plan, as set forth in the Final Parcel G Work Plan, differs
20 significantly from the selected remedy in the 2009 Parcel G ROD, but the Navy has not amended
21 the ROD, or issued an ESD, as required by the NCP.

22 180. The NCP requires that "[a]fter the adoption of the ROD, if the remedial action or
23 enforcement action taken, or the settlement or consent decree entered into, differs significantly
24 from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency
25 shall consult with the support agency, as appropriate, and shall either: (i) [p]ublish an explanation
26 of significant differences when the differences in the remedial or enforcement action, settlement,
27 or consent decree significantly change but do not fundamentally alter the remedy selected in the
28 ROD with respect to scope, performance, or cost....[or] (ii) [p]ropose an amendment to the ROD

1 if the differences in the remedial or enforcement action, settlement, or consent decree
2 fundamentally alter the basic features of the selected remedy with respect to scope, performance,
3 or cost." 40 C.F.R. § 300.435(c)(2).

4 181. The Parcel G Work Plan differs fundamentally and significantly from the remedy
5 set forth in the Parcel G ROD, in the following ways:

6 a. The Navy and EPA collected new soil samples to determine new
7 background levels for the ROCs. This resulted in higher background levels for cesium-137 and
8 radium-226 than those used during previous remediation activities.⁷

9 b. The new background levels required changing the remedial goal for cesium-
10 137, which is now higher than the remedial goal specified in the ROD. *Compare* Background
11 Report Table 7-1 *and* Table 7-2. Yet, the Navy did not document this remedial goal change in
12 either a ROD amendment or an ESD, despite the increased scope of work and the increased costs
13 associated with altering this fundamental component of the remedy.

14 c. The remedial goal for radium-226 also changed, because it is set according
15 to the background level for radium-226, which increased based on the 2019 Background Soil
16 Study. *Id.* Defendants did not document this change in a ROD amendment or an ESD.

17 d. Due to the rework required by the Final Parcel G Work Plan, the cost of the
18 remedy has increased significantly over the already-completed remedy selected in the ROD, yet
19 neither the Navy nor EPA have analyzed these increased costs, let alone justified them.

20 e. The durable cover, a key component of the selected remedy, is being
21 destroyed.

22 182. Despite these significant changes to the remedy selected in the ROD, the Navy has
23 not issued an ESD or amended the ROD as required by CERCLA and the NCP.

24 183. The decision not to issue or require a ROD amendment is contrary to EPA's own
25 guidance, which requires that "fundamental changes" to the remedy selected in the ROD,
26

27 ⁷ Final Background Soil Study Report, Base Realignment and Closure Program Management
28 Office West, Former Hunters Point Naval Shipyard, San Francisco, California (June 2020)
(Background Report), at 7-1–7-3.

1 including those that involve "an appreciable change or changes in the scope, performance, and/or
2 cost" or "a number of significant changes that together have the effect of a fundamental change,"
3 be documented in a ROD amendment. *See* EPA Remedy Selection Guidance, at 7-2-7-4.

4 184. The decision not to issue or require an ESD is contrary to EPA's own guidance,
5 which requires that "significant changes" to the remedy selected in the ROD, including large
6 increases in cost or new cleanup levels, require an ESD. *See* EPA Remedy Selection Guidance,
7 Highlight 7-1: Examples of Post-Record of Decision Changes, at 7-3.

8 185. The Navy's failure to issue a ROD amendment or an ESD, and EPA's failure to
9 require a ROD amendment or an ESD, are arbitrary and capricious and not in accordance with the
10 law.

11 186. The Navy and EPA acted arbitrarily and capriciously and violated CERCLA and
12 the NCP. Thus, the costs associated with the preparation, approval, and implementation of the
13 Final Parcel G Work Plan are inconsistent with CERCLA, and are not recoverable costs.

14 **REQUEST FOR RELIEF**

15 WHEREFORE, TtEC respectfully requests that this Court enter a judgment and order, as
16 follows:

17 1. Declaring that the Final Parcel G Work Plan is arbitrary, capricious, and not in
18 accordance with the law;

19 2. Declaring that any costs associated with the preparation, approval, and
20 implementation of the Final Parcel G Work Plan are not recoverable from TtEC;

21 3. Awarding TtEC its reasonable fees, costs, expenses, and disbursements, including
22 attorneys' fees, associated with this action, under the Equal Access to Justice Act, codified at Title
23 28, United States Code, section 2412(d); and

24 4. Awarding TtEC such additional and further relief as this Court may deem just,
25 proper, and necessary.

26 ///

27 ///

28 ///

1 DATED: November 17, 2020

HANSON BRIDGETT LLP

2
3 By: /s/ Davina Pujari

4 DAVINA PUJARI

5 SAMIR J. ABDELNOUR

6 ROSSLYN HUMMER

MELISSA M. MALSTROM

7 Attorneys for Plaintiff

TETRA TECH EC, INC.

EXHIBIT A

EXHIBIT A

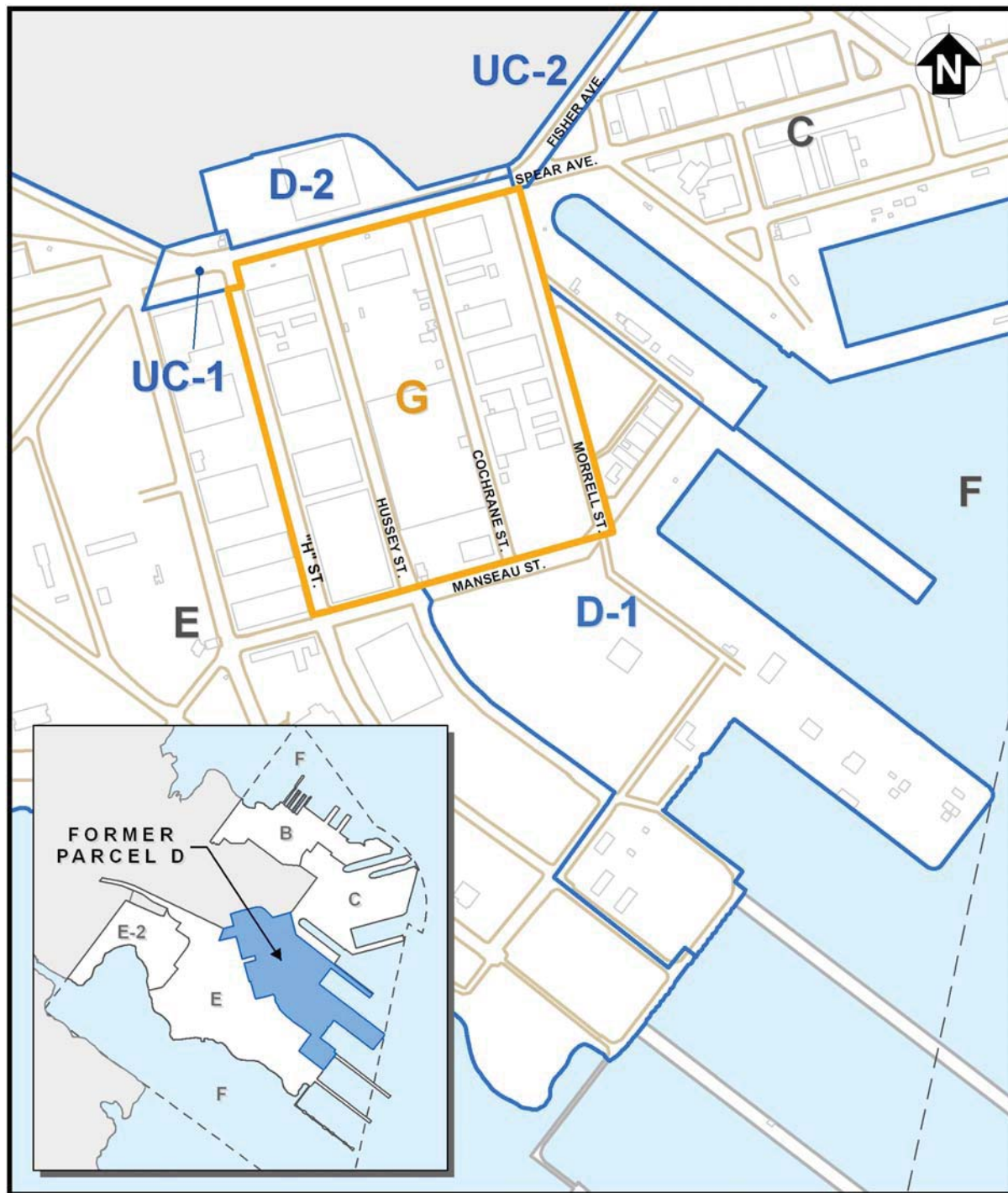


Figure 2. Parcel G Location Map